

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

February 15, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

SITAMIPA TOKI,

Defendant - Appellant.

No. 17-4153
(D.C. No. 2:16-CV-00730-TC)
(D. Utah)

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ERIC KAMAHELE,

Defendant - Appellant.

No. 17-4154
(D.C. No. 2:15-CV-00506-TC)
(D. Utah)

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

KEPA MAUMAU,

Defendant - Appellant.

No. 17-4155
(D.C. No. 2:15-CV-00600-TC)
(D. Utah)

ORDER GRANTING CERTIFICATE OF APPEALABILITY

Before **BALDOCK**, Circuit Judge.

In these consolidated appeals, Eric Kamahele appeals from a district court order that denied his 28 U.S.C. § 2255 motion for sentencing relief on issues of ineffective assistance of counsel and due process. Additionally, along with Kepa Maumau and Sitamipa Toki, Kamahele seeks a certificate of appealability (COA) to challenge the district court's denial of § 2255 relief on multiple other issues.

A COA will issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This standard requires "a demonstration that . . . includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further."

Slack v. McDaniel, 529 U.S. 473, 484 (2000) (internal quotation marks omitted).

Having considered Appellants' Opening Brief and Request for Certificate of Appealability (COA), we conclude that a COA is warranted (beyond the issues already certified by the district court), and is hereby granted, on the following two issues:

(1) Whether "[a] challenge to a conviction based on the residual clause of § 924(c) is timely under 28 U.S.C. § 2255(f)(3) if it is filed within a year of *Johnson [v. United States*, 135 S. Ct. 2551 (2015)]," Aplt. Opening Br. and Request for COA at 9; and

(2) Whether Appellants' "VICAR convictions based on Utah and Arizona aggravated assault are not categorically crimes of violence under the force clause of § 924(c) because they do not require the intentional use of violen[t] force," *id.* at 25.

But in light of recent filings that may impact the issues on which we grant a COA, we ABATE these appeals. Specifically, the government has filed a certiorari petition in *United States v. Salas*, 889 F.3d 681 (10th Cir. 2018), *petition for cert. filed*, (U.S. Oct. 3, 2018) (No. 18-428), and the Supreme Court had granted certiorari in an analogous Fifth Circuit case, *United States v. Davis*, 903 F.3d 483 (5th Cir. 2018) (per curiam), *cert. granted*, 2019 WL 98544 (U.S. Jan. 4, 2019) (No. 18-431), to examine whether § 924(c)'s residual clause is unconstitutionally vague in light of *Johnson* and *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018). Further, in *United States v. Bowen*, No. 17-1011, this court granted a COA on issues similar to those involved here, and then abated that appeal pending further developments from the Supreme Court. This court will establish a briefing schedule on the two issues identified above when the abatement is lifted.

Accordingly, on or before June 14, 2019, the United States shall file a written report to advise this court of the status of *Davis* and the petition for writ of certiorari in *Salas*. Thereafter, the United States shall file a status report every sixty days (or sooner if the Supreme Court takes significant action in either case).

Entered for the Court



ELISABETH A. SHUMAKER, Clerk